

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)
COXCOM, INC., d/b/a/ Cox Communications) CSR 7768-E
San Diego) 7769-E
Petition for Determination of Effective) 7770-E
Competition in 27 Communities in California)

MEMORANDUM OPINION AND ORDER

Adopted: April 30, 2008

Released: May 1, 2008

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION AND BACKGROUND

1. COXCOM, INC., d/b/a/ Cox Communications San Diego, hereinafter referred to as "Petitioner," has filed with the Commission three petitions pursuant to Sections 76.7, 76.905(b)(2), 76.905(b)(4) and 76.907 of the Commission's rules for determinations that Petitioner is subject to effective competition in those communities listed on Attachment A and hereinafter referred to as "Communities." Petitioner alleges that its cable systems serving the Communities are subject to effective competition pursuant to Section 623(1) of the Communications Act of 1934, as amended ("Communications Act")¹ and the Commission's implementing rules,² and are therefore exempt from cable rate regulation in the Communities because of the competing services provided by (1) two direct broadcast satellite ("DBS") providers, DirecTV, Inc. ("DirecTV") and Dish Network ("Dish"), (2) Pacific Bell Telephone Company, d/b/a/ SBC Pacific Bell Telephone Company and AT&T California ("AT&T"), (3) competing Cable Operators, and (4) Satellite Master Antenna TV or Private Cable Operators. Petitioner alternatively claims that its cable systems serving the Communities listed on Attachment B are subject to effective competition because of the competing service provided by AT&T, hereinafter referred to as "Competitor." The petitions are unopposed.³

2. In the absence of a demonstration to the contrary, cable systems are presumed not to be subject to effective competition,⁴ as that term is defined by Section 623(1) of the Communications Act and Section 76.905 of the Commission's rules.⁵ The cable operator bears the burden of rebutting the presumption that effective competition does not exist with evidence that effective competition is present

¹See 47 U.S.C. § 543(a)(1).

²47 C.F.R. § 76.905(b)(2) and 47 C.F.R. § 76.905(b)(4).

³We have received letters supporting the Petitions from the U.S. Marine Corps (Camp Pendleton), the City of Chula Vista, the City of El Cajon, the City of Encinitas, the City of Escondido, the City of Oceanside, the City of Poway, the City of San Diego, the County of San Diego, the City of Santee, the City of Vista, the Neighborhood Market Association, the San Diego Regional Economic Development Corporation, the South County Economic Development Council, the San Ysidro Chamber of Commerce, and a public benefits organization named Connect.

⁴47 C.F.R. § 76.906.

⁵See 47 U.S.C. § 543(l) and 47 C.F.R. § 76.905.

within the relevant franchise area.⁶ For the reasons set forth below, we grant the petitions based on our finding that Petitioner is subject to effective competition in the Communities listed on Attachments (A and B).

II. DISCUSSION

A. The Competing Provider Test

3. Section 623(l)(1)(B) of the Communications Act provides that a cable operator is subject to effective competition if the franchise area is (a) served by at least two unaffiliated multi-channel video programming distributors (“MVPD”) each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and (b) the number of households subscribing to programming services offered by MVPDs other than the largest MVPD exceeds 15 percent of the households in the franchise area;⁷ this test is otherwise referred to as the “competing provider” test.

4. The first prong of this test has three elements: the franchise area must be “served by” at least two unaffiliated MVPDs who offer “comparable programming” to at least “50 percent” of the households in the franchise area.⁸

5. Turning to the first prong of this test, it is undisputed that these Communities are “served by” both DBS providers, DIRECTV and Dish, and that these two MVPD providers are unaffiliated with Petitioner or with each other. A franchise area is considered “served by” an MVPD if that MVPD’s service is both technically and actually available in the franchise area. DBS service is presumed to be technically available due to its nationwide satellite footprint, and presumed to be actually available if households in the franchise area are made reasonably aware of the service’s availability.⁹ The Commission has held that a party may use evidence of penetration rates in the franchise area (the second prong of the competing provider test discussed below) coupled with the ubiquity of DBS services to show that consumers are reasonably aware of the availability of DBS service.¹⁰ We further find that Petitioner has provided sufficient evidence of DBS advertising in local, regional, and national media that serve the Communities to support their assertion that potential customers in the Communities are reasonably aware that they may purchase the service of these MVPD providers.¹¹ The “comparable programming” element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming¹² and is supported in this petition with copies of channel lineups for both DIRECTV and Dish.¹³ Also undisputed is Petitioner’s assertion that both DIRECTV and Dish offer service to at least “50 percent” of the households in the Communities because of their national satellite footprint.¹⁴ Accordingly, we find that the first prong of the competing provider test is satisfied.

⁶See 47 C.F.R. §§ 76.906 & 907.

⁷47 U.S.C. § 543(1)(1)(B); *see also* 47 C.F.R. § 76.905(b)(2).

⁸47 C.F.R. § 76.905(b)(2)(i).

⁹See Petition in CSR 7768-E at 6-7.

¹⁰Mediacom Illinois LLC et al., *Eleven Petitions for Determination of Effective Competition in Twenty-Two Local Franchise Areas in Illinois and Michigan*, 21 FCC Rcd 1175 (2006).

¹¹47 C.F.R. § 76.905(e)(2).

¹²See 47 C.F.R. § 76.905(g). *See also* Petition in CSR 7769-E at 4.

¹³See Petition in CSR 7770-E at Exh. 3.

¹⁴See Petition in CSR 7768-E at 4-5.

6. The second prong of the competing provider test requires that the number of households subscribing to MVPDs, other than the largest MVPD, exceed 15 percent of the households in a franchise area. Petitioner asserts that it is the largest MVPD in the Communities.¹⁵ Petitioner sought to determine the competing provider penetration in the Communities, to the extent it was made up of subscribers to DIRECTV and Dish, by purchasing a subscriber tracking report from the Satellite Broadcasting and Communications Association (“SBCA”) that identified the number of subscribers attributable to the DBS providers within the Communities on a zip code and zip code plus four basis where necessary.¹⁶

7. The Petition in CSR 7768-E states data that purports to show competing provider effective competition in “Uninc. San Diego County.”¹⁷ The Petition leaves unclear, however, whether the quoted words refer to one or both of Petitioner’s “San Diego County” Community Unit Identification Numbers (CA0420 and CA0469) or, in addition, the several CUIDs that the Petition describes as part of Petitioner’s “unincorporated San Diego franchise area.”¹⁸ We are uncertain, therefore, what franchise area or areas Petitioner’s stated data applies to. Accordingly, we deny Petitioner’s request that we find that competing provider effective competition exists in any of the Communities mentioned in this paragraph. As discussed below, however, we find that these same franchise areas are subject to effective competition under the LEC test.

8. Based upon the aggregate DBS subscriber penetration levels that were calculated using Census 2000 household data (and other data concerning areas for which no Census data was available),¹⁹ as reflected in Attachment A, we find that Petitioner has demonstrated that the number of households subscribing to programming services offered by MVPDs, other than the largest MVPD, exceeds 15 percent of the households in the Communities. Therefore, the second prong of the competing provider test is satisfied for each of the Communities.

9. Based on the foregoing, we conclude that Petitioner has submitted sufficient evidence demonstrating that both prongs of the competing provider test are satisfied and Petitioner is subject to effective competition in the Communities listed on Attachment A.

B. The LEC Test

10. Section 623(l)(1)(D) of the Communications Act provides that a cable operator is subject to effective competition if a local exchange carrier (“LEC”), or its affiliate, offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services offered in that area are comparable to the video programming services provided by the competing unaffiliated cable operator;²⁰ this test is otherwise referred to as the “LEC” test.

11. The Commission has stated that the incumbent cable operator must show that the LEC intends to build-out its cable system within a reasonable period of time if it has not completed its build-

¹⁵Petition in CSR 7769-E at 9.

¹⁶Petition in CSR 7770-E at 9-10.

¹⁷Petition in CSR 7768-E at 14.

¹⁸Petition in CSR 7769-E at 3 n.7. The latter CUIDs are CA0214 (Whispering Palms), CA0640 (Ramona), CA0701 (San Diego Country Estates), CA0712 (Rancho San Diego), CA0979 (Pine Valley), CA1282 (Jamul), and CA1588 (Ramona).

¹⁹Petition in CSR 7768-E at 10-12.

²⁰See 47 U.S.C. § 543(l)(D).

out; that no regulatory, technical or other impediments to household service exist; that the LEC is marketing its services so that potential customers are aware that the LEC's services may be purchased; that the LEC has actually begun to provide services; the extent of such services; the ease with which service may be expanded; and the expected date for completion of construction in the franchise area.²¹ It is undisputed that these Communities are served by both Petitioner and Competitor, a local exchange carrier, and that these two MVPD providers are unaffiliated. The "comparable programming" element is met if a competing MVPD provider offers at least 12 channels of video programming, including at least one channel of nonbroadcast service programming²² and is supported in this petition with copies of channel lineups for Competitor.²³ Finally, Petitioner has demonstrated that the Competitor has commenced providing video programming service within the Communities, has marketed its services in a manner that makes potential subscribers reasonably aware of its services, and otherwise satisfied the LEC effective competition test consistent with the evidentiary requirements set forth in the *Cable Reform Order*.²⁴

12. Based on the foregoing, we conclude that Petitioner has also submitted sufficient evidence demonstrating that its cable system serving the Communities listed on Attachment B has met the LEC test and is subject to effective competition.

III. ORDERING CLAUSES

13. Accordingly, **IT IS ORDERED** that the petitions for determinations of effective competition filed in the captioned proceeding by COXCOM, INC., d/b/a/ Cox Communications San Diego **ARE GRANTED**.

14. **IT IS FURTHER ORDERED** that the certification to regulate basic cable service rates granted to any of the Communities set forth on Attachment A and B **ARE REVOKED**.

15. This action is taken pursuant to delegated authority pursuant to Section 0.283 of the Commission's rules.²⁵

FEDERAL COMMUNICATIONS COMMISSION

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²¹See *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, 5305-06, ¶¶ 13-16 (1999) ("*Cable Reform Order*").

²²See 47 C.F.R. § 76.905(g). See also Petition in CSR 7769-E at 16, 30-31.

²³See Petition in CSR 7770-E at Exh. 5.

²⁴See *Cable Reform Order*, 14 FCC Rcd at 5305-06, ¶¶ 13-16. See also Petition in CSR 7768-E at 18-30.

²⁵47 C.F.R. § 0.283.

ATTACHMENT A

CSR 7768-E

COMMUNITIES SERVED BY COXCOM, INC. D/B/A COX COMMUNICATIONS SAN DIEGO

Communities	CUID(S)	CPR*	2000 Census or Other Household Data	Estimated Competitors' Subscribers
CSR 7768-E				
Chula Vista	CA0329	20.62%	57705	11900
Encinitas	CA1341	36.46%	22830	8324
Escondido	CA0085	30.35%	43817	13299
National City	CA0419	15.79%	15018	2371
Oceanside	CA0776	20.35%	56488	11497
Poway	CA0334	23.26%	15467	3597
San Marcos	CA0600	39.35%	18111	7126
Solana Beach	CA1342	47.99%	5754	2761
Vitsa	CA0601	24.61%	28877	8152

*CPR = Percent of competitors' penetration rate.

ATTACHMENT B

CSR 7768-E, 7769-E, 770-E

COMMUNITIES SERVED BY COXCOM, INC. D/B/A COX COMMUNICATIONS SAN DIEGO

Communities	CUID(S)
CSR 7768-E	
Camp Pendleton	CA0656 CA0704
Chula Vista	CA0329
El Cajon	CA0330
Encinitas	CA1341
Escondido	CA0085
Imperial Beach	CA0421
Jamul	CA1282
La Mesa	CA0332
Lemon Grove	CA0878
National City	CA0419
Oceanside	CA0776
Poway	CA0334
Ramona	CA0640 CA1588
Rancho San Diego	CA0712
San Diego City	CA0335
San Diego City Central	CA1708
San Diego County	CA0420 CA0469
San Diego Country Estates	CA0701
San Marcos	CA0600
Santee	CA0337

CSR 7768-E (continued)

Solana Beach CA1342

Vitsa CA0601

Whispering Palms CA0214

CSR 7769-E

Camp Pendleton CA0656

CSR 7770-E

Pine Valley CA0979